

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
WHITE PLAINS DIVISION

HEARING DATE: AUGUST 17, 2011
HEARING TIME: 9:55 AM
HEARING PLACE: ROOM 118

In Re:

Chapter 13

Sonia Batista,

Judge: Robert D. Drain

Debtor

Case No. **11-23127**

**NOTICE OF MOTION TO AVOID MORTGAGE LIEN HELD BY SELECT
PORTFOLIO SERVICING**

PLEASE TAKE NOTICE that debtor, Sonia Batista, by and through her attorney, Bruce Bronson, Esq. will move this court at the United States Bankruptcy Court, 300 Quarropas Ave, White Plains, New York 10601, on August 17, 2011 at 9:55 am, or as soon thereafter as counsel may be heard, for an order:

1. Avoiding the second mortgage lien of Select Portfolio Servicing on the debtors principle residence at 123 Summit Ave., Mount Vernon, NY 10550 and;
2. Reclassifying this claim as unsecured.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are required to be served upon the under signed at least seven (7) days before the return date of this motion.

Dated: July 26, 2011

By: s/Bruce Bronson, Esq.
Bruce Bronson, Esq.
Attorney for debtor
Bar ID: HB3263
600 Mamaroneck Ave, Suite 400
Harrison, NY 10528-0023

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Case No. **11-23127**

**MOTION TO AVOID MORTGAGE LIEN HELD BY SELECT PORTFOLIO
SERVICING**

H. Bruce Bronson, Esq., on behalf of the debtor Sonia Batista, hereby states:

1. Sonia Batista (“Debtor”) filed a voluntary petition under Chapter 13 of the Bankruptcy Code on June 4, 2011. (**Exhibit A – Voluntary Petition**).
2. The Debtor owns real property located at 123 Summit Ave., Mount Vernon, NY 10550. (hereinafter “The Property”). The Property is the Debtor’s primary residence and the property is valued at \$425,000.00. (**Exhibit B – Appraisal**).
3. The Property is secured by two Mortgages.
4. The First Mortgage is with America’s Servicing Company (hereinafter “ASC”) and the principal balance owed as of the filing date is \$741,816.18. (**Exhibit C – Proof of Claim**).
5. The second mortgage is held by Select Portfolio Servicing (hereinafter “SPS”) and the principal balance owed is \$54,325.00 as of May 22, 2011. (**Exhibit D – Credit Report**)
6. The lien held by ASC, the first mortgage on the Property, in and of itself, exceeds the Property’s value.

7. The amount owed SPS is therefore wholly unsecured pursuant to 11 U.S.C. § 506(a).
8. The lien held by SPS is therefore void pursuant to 11 U.S.C. § 506(d).
9. In accordance with 11 U.S.C. §506(a), an under secured claim is a secured claim only to the extent of the value of the underlying collateral, and is an unsecured claim for the balance.
10. 11 U.S.C. §506(d) provides that a lien securing a claim against the debtor that is not an allowed secured claim is void.
11. 11 U.S.C. §1322 (b)(2) provides that the Chapter 13 Plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtors residence.
12. The Second Circuit has held that a wholly unsecured mortgage lien may be stripped off in a Chapter 13 proceeding notwithstanding the antimodification provisions of 11 U.S.C. §1322 (b)(2). *In re Pond* 252 F.3d 122 (2nd Cir. 2001).

Wherefore, it is respectfully requested that the Court enter an Order as follows: 1) determining that the claim against the estate by SPS, or any successor, is wholly unsecured, and 2) that the mortgage by SPS, or any successor, be declared void and discharged as a lien on the Property, located at 123 Summit Ave., Mount Vernon, NY 10550 and 3) modifying SPS's claim to a general, unsecured claim if SPS, or any successor, files a claim in the bankruptcy; and 4) granting such other and further relief as the Court deems just and proper.

Dated: July 26, 2011

By: s/Bruce Bronson, Esq.

Bruce Bronson, Esq.

Attorney for debtor

Bar ID: HB3263

600 Mamaroneck Ave,

Suite 400

Harrison, NY 10528-0023

UNITES STATES BANKRUPTCY COURT
SOUTHER DISTRICT OF NEW YORK

----- x
In re:

ORDER

Case No. 11-23127 (rdd)

Sonia Batista

Debtor,
----- x

ORDER VOIDING MORTGAGE LIEN OF SELECT PORTFOLIO SERVICING

Upon the motion of the above debtor (the “Debtor”), by Bronson Law Offices, P.C. for an order determining that the mortgage lien held by Select Portfolio Servicing on the Debtor’s property located at 123 Summit Ave., Mount Vernon, NY 10550 (the “Property”) is void as being wholly unsecured under 11 U.S.C. §§ 506(a) and 1322, and reclassifying the secured claim of Select Portfolio Servicing as an unsecured claim, if filed (the “Motion”); and it appearing that due and sufficient notice of the Motion and the hearing thereon was provided to Select Portfolio Servicing, the Chapter 13 Trustee and the U.S. Trustee; and upon the record of the hearing held by the Court having on the Motion on August 17, 2011 at 9:55 a.m., at which Bronson Law Offices, P.C. appeared in support thereof; and there being no opposition to the requested relief; and, upon due deliberation, it appearing that the amount of senior debt secured by the Property materially exceeds the Debtor’s obligations to America’s Servicing Company secured by America’s Servicing Company’s mortgage on the Property; and good cause appearing, it is hereby ORDERED that

1. The Motion is granted,
2. Any claim timely filed by Select Portfolio Servicing against the Debtor and her estate shall be treated as wholly unsecured,
3. Select Portfolio Servicing’s mortgage on the Property is declared void and discharged as a lien on the Property, see, *In re Pond* 252 F.2d 122 (2d Cir. 2001), subject to rights under 11 U.S.C. §363(k) and its right to seek to have such a lien reinstated upon dismissal of the Debtor’s Chapter 13 case prior to the performance of the Debtor’s Chapter 13 plan voiding such mortgage under 11 U.S.C. §1322(b)(2).
4. The Westchester County Clerk is directed to mark on its records that mortgage on the property is void and discharged pursuant to Bankruptcy Court Order, subject to the right of Select Portfolio Servicing to have such mortgage reinstated upon any dismissal of the Debtor’s Chapter 13 case prior to the performance of the Debtor’s Chapter 13 plan voiding such mortgage under 11 U.S.C. §1322(b)(2); provided that the Debtor may in the alternative copy of this Order with the Westchester County Clerk to provide such notice.

Dated: White Plains, N.Y.
_____, 2011

HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE